Supreme Court, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

Crim

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 75-362

PATRICIA ANN CRABTREE, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

THOMAS D. McDOWELL

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Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

PATRICIA ANN CRABTREE, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on July 21, 1975, granting the Respondent's motion to vacate and remand the judgment of the United States District Court for the Southern District of Texas revoking Petitioner's probation.

ORDER BELOW

The order of the Court of Appeals of which review is sought is printed in Appendix A hereto, infra, page 1a. No written opinion was handed down by that Court in connection with

its action granting Respondent's Motion to Vacate and Remand, nor any reasons given for denying Petitioner's Motion for Reconsideration or Modification.

JURISDICTION

The judgment of the District Court was entered on February 28, 1975, pertinent provisions of which are printed in Appendix C, infra, page 3a. The order of the Court of Appeals denying Petitioner's Motion for Reconsideration was entered on August 11, 1975, and is printed in Appendix B hereto, infra, page 2a.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

(1) Does summary order of Court of Appeals, without written opinion, vacating and remanding Petitioner's revocation of probation judgment, deprive her of right to have her appeal considered on its merits and a fair opportunity to present her grounds for the only relief she requested--reversal and reinstatement of her probation?

(2) Does vacation by Court of Appeals of District Court order revoking Petitioner's probation subject her to double jeopardy on remand for rehearing when there was insufficient evidence to support such revocation.

(3) Did ex parte telephone conversation between

District Judge and Petitioner's absent probation officer during recess of revocation hearing, the substance of which was referred to by Court in questioning Petitioner, so undermine and frustrate Petitioner's right of confrontation by such officer as not to be ameliorated on rehearing?

(4) Was Petitioner's Fifth Amendment right against self incrimination violated when District Court acknowledged her probation would be revoked if she didn't testify at revocation hearing?

(5) Was evidence insufficient to support revocation of Petitioner's probation where it consisted only of hearsay and her own coerced testimony?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved are those parts of the Fifth and Sixth Amendments to the United States Constitution which provide that (1) ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", (2) ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty . . . without due process of law . . .", and (3) "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The statute involved is 28 U.S.C. Sec. 2106 which reads as follows:

"Determination--The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Texas, Corpus Christi Division, of possession with intent to distribute marijuana and placed on probation for a term of four years by judgment entered on July 18, 1973, pertinent provisions of which are printed herein as Appendix D, infra, page 4a. Thereafter, a petition for revocation of her probation was filed on January 20, 1975, and a judgment of revocation and commitment was entered on February 28, 1975, the pertinent portions of which are shown printed as Appendices E and C, infra, pages 5a and 3a respectively.

The grounds asserted by the probation officer for revocation were, briefly, that the Petitioner had (1) violated a special condition prohibiting her from "associating with persons who have ever been involved in the drug culture", and (2) failed to associate only with law-abiding persons. (Appendix E). The revocation petition was a result of her having been arrested in Fort Worth, Texas, on November 2, 1974, for possession of marijuana, a charge which was subsequently dropped after a state grand jury declined to indict her. It was undisputed

that there were no criminal charges pending against her. Although Petitioner resided in Fort Worth, the hearing took place in the convicting court in Corpus Christi. The resident probation officer recited into the record information from police reports concerning the incident surrounding her arrest, other information received from her probation officer in Fort Worth to whom she was assigned for supervision, and responded to the few questions the District Court allowed her counsel herein. All of the evidence offered against her by this officer was hearsay. (R.3-5,8-11) The District Court proceeded to place the burden of proof on the probationer, threatened to revoke her probation if she didn't testify, and confronted her with the matters he had discussed with her absent probation officer by telephone during a recess of the hearing.[1] (R.7,13,48) Objection was duly made to the Court's consideration and use of this evidence, but to no avail. (R.13,52,53)

Petitioner thereafter duly perfected her appeal to the United States Court of Appeals for the Fifth Circuit. Respondent failed to timely file a brief, and moved instead to vacate and

---

[1]These errors and insufficiency of evidence points were preserved and presented as Questions 1, 3, and 4 in her brief in the Court of Appeals which reads as follows:
"1. Whether Probationer's Fifth Amendment right against self-incrimination was violated when district court announced its intention to revoke her probation unless she testified at revocation proceeding.
"3. Whether use of hearsay evidence and failure of court to afford probationer an opportunity to confront witnesses deprived her of minimum requirements of due process applicable to probation revocations.
"4. Whether district court abused its discretion in revoking probation when only evidence of conditions allegedly violated were hearsay statements of probation officer, judge's private telephone conversation with another probation officer, and probationer's own coerced testimony."

remand, confessing the error of denial of Petitioner's right of confrontation by the supervisory probation officer in Fort Worth. Response was duly filed in opposition to such motion, however, the Court of Appeals granted the relief requested by the Government and denied reconsideration of its order of vacation and remand.

REASONS WHY THE WRIT SHOULD BE GRANTED

Admittedly, a revocation of probation proceeding is not a "trial", however, this honorable Court has recently declared what process is due and laid down minimum standards therefor in such proceedings. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973). The minimum requirements mandated by those decisions were not met in this case and the errors of the District Court were so gross and of such consitutional dimension as to deprive Petitioner of fundamental fairness in several aspects of the hearing, particularly the coercion of her testimony and the denial of her right of confrontation. The denial of confrontation with the probation officer from Fort Worth is not subject to amelioration because the hearsay evidence from that source was not only communicated by the local probation officer at the hearing, but also directly to the District Judge, ex parte, who in effect became a witness himself when he confronted the probationer with the substance of his telephone conversation. This destroyed any hope of an effective exercise of the right of confrontation as

contemplated by the Sixth Amendment. Further, the District Court couldn't be said to have given Petitioner "full right to be heard according to law", by affording her an impartial tribunal on the issue of whether she violated the conditions of her probation, particularly when he either initiated or considered ex parte communication from one who must certainly be classified as "legally interested" in a contested revocation proceeding. This activity is proscribed by Canon 3 A(4) of the Code of Judicial Conduct for United States Judges.

It is submitted that where there is insufficient evidence to sustain revocation of probation as in this case, Petitioner is in the same position as one who has been convicted in a trial but who has not sought a new trial. It has been held in a number of cases by the Court of Appeals for the Fifth Circuit that re-trial should not be permitted where there is a reversal on the basis of insufficiency of the evidence, and the Defendant did not request a new trial in the District Court. See U.S. v. Horton, 488 F.2d 374 (5th Cir. 1973), U.S. v. Apollo, 487 F.2d 156 (5th Cir. 1973), U.S. v. Restano, 449 F.2d 485 (5th Cir. 1971), U.S. v. Musquiz, 445 F.2d 963 (5th Cir. 1971), U.S. v. Ferg, 504 F.2d 914 (5th Cir. 1974), U.S. v. Love, 472 F.2d 490 (5th Cir. 1973). All of the foregoing cases were following the decision by the Supreme Court in Sapir v. United States, 348 U.S. 373, 75 S.Ct. 422 (1955).

If re-trial is considered inappropriate where even a

different jury would be passing on the facts, certainly it is all the more inappropriate where the same judge who coerced the accused's testimony and in effect became a witness himself is given another opportunity to commit the same errors again, with no guidance or information that he was wrong in the first place. What earthly purpose can be served on such a rehearing other than to afford the government another bite out of the apple? Petitioner did not seek a rehearing before the District Court and did not assign as error on appeal the refusal of that Court to continue the hearing. The only relief she is requesting is reversal of the judgment and reinstatement of her probationary status. It cannot be said that a summary granting of the Government motion to vacate and remand is "just under the circumstances" 28 U.S.C. Sec. 2106, where the only beneficiary of such an order is Respondent which took full advantage of the errors complained of herein at the time of the hearing. Moreover, Petitioner's counsel didn't mislead the District Court or cause confusion which might be calculated to induce that Court to commit the complained of errors. The record is replete with counsel's objections to the deprivation of fundamental fairness in the way the hearing was conducted from its outset. A remand under these circumstances is analogous to a new trial being ordered, but before the same jury that convicted to begin with.

Rule 19(b), Rules of the Supreme Court, as one of the considerations governing review on certiorari, provides in part

that "Where a court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Emphasis added)

What clearer illustration can there be of the applicability of this particular ground for granting review than in this case where the Court of Appeals has apparently sanctioned the departure from the minimum requirements laid down in Morrissey and Gagnon, supra, governing probation revocation proceedings? The distinction set out in Forman v. United States, 361 U.S. 416, 80 S.Ct. 481 (1960) does not alter the appropriate disposition of this case, but rather fortifies Petitioner's contention that she is entitled to reinstatement of her probation. [2,3] Any differentiation between a trial or revocation hearing as to the appropriate disposition of this cause where rehearing was not sought either at the district or appellate court, and there was insufficient evidence to support the judgment of revocation, is a distinction

---

[2]in Forman, supra, at 80 S.Ct. 487, the Supreme Court said: ". . . Here there was no lack of evidence in the record. As the Court of Appeals pointed out, 'The jury was simply not properly instructed.' 264 F.2d at page 956. On the other hand, the order to dismiss in Sapir was based on the insufficiency of the evidence, which could be cured only by the introduction of new evidence, which the Government assured the court was available. Moreover, Sapir made no motion for a new trial in the District Court, while here petitioner filed such a motion. That was a decisive factor in Sapir's case . . ." (Emphasis Added)

[3]Wright, Federal Practice and Procedure: Criminal Sec. 470 (1969)
"If a defendant does not ask for a new trial, and moves only for acquittal, the appellate court must acquit and cannot order a new trial."

without a difference. Further, where the Government failed to meet its burden of proof (concededly not that of beyond a reasonable doubt), it seems to be unconscionable to allow it to introduce new and additional evidence on a rehearing where such a procedure is not permissible where a trial is involved. In either case, and even more so in revocation proceedings, the Defendant's liberty is at stake, and the Government should not be allowed additional opportunities to correct the hearing court's mistakes, particularly where there is no invitation by the probationer. and the Government was represented by counsel and took full advantage of these errors. It is submitted that at least an opportunity should be afforded Petitioner in her contention that this cause should be finally determined on its merits in view of the authorities cited supporting this relief where trials are involved.

Finally, it is obvious from the record of this proceeding that the District Court needs the enlightenment of a higher court in the matters raised on appeal. It follows that the summary order of vacation and remand is sanctioning a significant departure from the now accepted procecure in the conduct of such proceedings. Rule 19(b), supra.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

THOMAS D. McDOWELL

HOWARD, McDOWELL & CARTWRIGHT
315 United Savings Building
Corpus Christi, Texas 78411

Attorney for Petitioner

APPENDIX

U.S. COURT OF APPEALS
FILED
JUL 21 '75
EDWARD W. WADSWORTH
CLERK

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-1802

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICIA ANN CRABTREE,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Southern District of Texas

- - - - -

Before COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to vacate the judgment and remand the case to the District Court for the Southern District of Texas is Granted

J.P.C.

1a

A true copy
Test: EDWARD W. WADSWORTH

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-1802

U.S. COURT OF APPEALS
FILED
AUG 11 '75
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICIA ANN CRABTREE,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Southern District of Texas

- - - - -

Before COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for reconsideration of the Court's order granting appellee's motion to vacate the judgment and remand the case to the District Court for the Southern District of Texas is DENIED

J.P.C.

2a

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

JUDGMENT AND ORDER OF PRO[illegible]ION (Revised Dec. '66)

APPENDIX C

Cr. Form No. 101

United States District Court

FOR THE
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED

JUL 18 1973

V. BAILEY THOMAS, CLERK
BY DEPUTY: Sue M Lee

UNITED STATES OF AMERICA

v.

PATRICIA ANN CRABTREE

No. 72-C-125

On this 10th day of July, 1973, came the attorney for the government and the defendant appeared in person, and with counsel, Jack W. Beech.

IT IS ADJUDGED that the defendant upon her plea of not guilty, and a finding of guilty, has been convicted of the offense of possession with intent to distribute a controlled substance under Schedule I of the Controlled Substances Act of 1970, to-wit, Marihuana, in violation of Title 21, United States Code, Section 841(a)(1), as charged in Ct. 1 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted as a youth offender under the provisions of the Youth Corrections Act, Title 18, United States Code, Section 5010(a).

IT IS ADJUDGED that imposition of sentence is hereby suspended and the defendant is placed on probation for a period of FOUR (4) YEARS, with supervision of the U. S. Probation Officer in Fort Worth, Texas, and with the following special conditions: (1) the defendant is to completely disassociate herself from persons who have ever been involved in any phase of the drug culture; and (2) the defendant is to abide by all local, state and federal laws as well as the rules and regulations of the United States Probation Department.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

DONE at Corpus Christi, Texas, this 18 day of July, 1973.
APPROVED: BSR
(BSR:10th July,1973)

Owen D. Cox
United States District Judge.

V. BAILEY THOMAS, Clerk
Clerk.

APPENDIX D

United States District Court for the SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

United States of America vs.

DEFENDANT: PATRICIA ANN CRABTREE

DOCKET NO. 72-C-125

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: 2 DAY: 27 YEAR: 75

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Mr. Thomas D. McDowell (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

IT IS ADJUDGED that the defendant has violated the terms of probation of the sentence imposed herein on July 18, 1973, for the offense of possession with intent to distribute a controlled substance under Schedule I of the Controlled Substances Act of 1970, to-wit: Marihuana, in violation of Title 21, United States Code, Section 841(a)(1), as charged in the Indictment.

SENTENCE OR PROBATION ORDER

IT IS ADJUDGED that the defendant's probation is hereby revoked and the defendant is hereby committed to the custody of the Attorney General or his authorized representative pursuant to Title 18, United States Code, Section 5010(b) until discharged pursuant to Title 18, United States code, Section 5017(c).

SPECIAL CONDITIONS OF PROBATION

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED

FEB 28 1975

V. BAILEY THOMAS, CLERK
BY DEPUTY: Sue M Lee

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

APPROVED AS TO FORM:
B. STEPHEN RICE, AUSA

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Owen D. Cox
OWEN D. COX

Date 2-25-75

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Probation Form No. 12
(Revised 6-6-46)

APPENDIX E

United States District Court

FOR THE

SOUTHERN District of TEXAS

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED

JAN 20 1975

V. BAILEY THOMAS, CLERK
BY DEPUTY: Sue M. Cox

THE UNITED STATES

vs.

PATRICIA ANN CRABTREE

Division CORPUS CHRISTI

Docket No. C- 72-C-125

COMES NOW Calvin H. Bowden PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Patricia Ann Crabtree who was placed on probation by the Honorable Owen D. Cox sitting in the court at Corpus Christi in the 10th day of July 19 73 who fixed the period of probation supervision at FOUR (4) YEARS, and imposed the general terms and conditions of probation theretofore adopted by the court and also imposed special conditions and terms as follows:

(1) the defendant is to completely disassociate herself from persons who have ever been involved in any phase of the drug culture; and
(2) the defendant is to abide by all local, state and federal laws as well as the rules and regulations of the United States Probation Department.

RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS: (If short insert here; if lengthy write on separate sheet and attach)

The probationer has violated Condition #2 of her Conditions of Probation. Condition #2 states that the probationer shall associate only with law-abiding persons.

The subject has violated a special condition of the Court which reads "the defendant is to completely disassociate herself from persons who have ever been involved in any phase of the drug culture."

The allegations of violations mentioned above are based on the facts surrounding the probationer's possession of marihuana arrest on 11-2-74. It reflects that she was in the residence of one Durwood Eugene Hagar at the time of her arrest. The offense report also indicated that Albert Roe Bright, Jr. and John Claude Farmer also maintained a residence at that address. Mssrs. Hagar, Bright and Farmer all have criminal records.

PRAYING THAT THE COURT WILL ORDER THE ISSUANCE OF A BENCH WARRANT and set bond at $ 2,000 10% BRA to assure that the probationer will be brought before the Court as soon as possible to show cause why her probation should not be revoked.

ORDER OF COURT

Considered and ordered this 17th day of January 1975 and ordered filed and made a part of the records in the above case.

Owen D. Cox
U.S. District Judge

Respectfully,

Calvin H. Bowden
Probation Officer

Place Corpus Christi, Texas

Date Jan. 8, 1975

No. 75-362

Supreme Court, U. S.
FILED
DEC 2 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

PATRICIA ANN CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MICHAEL RODAK, JR., CLERK
DEC 2 1975
FILED
Supreme Court, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-362

PATRICIA ANN CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals improperly refused to consider the merits of her appeal of a district court order revoking her probation; and that by granting the government's motion to vacate the order and remanding the case to the district court for a second revocation hearing, the court of appeals placed her twice in jeopardy in violation of her Fifth Ammendment rights.

In July, 1973, following a jury-waived trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing with intent to distribute marihuana, in violation of 21 U.S.C. 841(a)(1). Imposition of sentence was suspended and petitioner was placed on probation for four years on condition, *inter alia,* that she "completely disassociate herself from persons who have ever been involved in any phase of the drug culture" (Pet. App. C). Petitioner did not appeal her conviction.

In November, 1974, petitioner was arrested in Fort Worth, Texas, and charged with possession of marihuana. When arrested, petitioner allegedly was in a house occupied by three individuals, all of whom had criminal records for drug related offenses (Pet. App. E). Accordingly, the United States Probation Officer in Corpus Christi, Texas, petitioned the court to revoke petitioner's probation on the ground that she had violated a condition of her probation (*ibid.*). A hearing was held in Corpus Christi, at which petitioner was represented by counsel. However, the probation officer who had had direct responsibility for supervising petitioner and who had reported the alleged violations of the condition of her probation did not attend the hearing.[1] Following the hearing, the district court revoked petitioner's probation and sentenced petitioner to confinement under the Youth Corrections Act, 18 U.S.C. 5010(b), until discharged pursuant to 18 U.S.C. 5017(c) (Pet. App. D).

Petitioner appealed the revocation of her parole on the ground, *inter alia*, that she had been denied due process of law because she had not been given the opportunity to confront her supervising probation officer, whose reports formed the basis of the allegations against her. In response, the government conceded the correctness of petitioner's contention and accordingly moved to vacate the district court's order and remand the case for a second hearing at which petitioner would have an opportunity to cross examine her supervising probation officer. Petitioner opposed the government's motion to vacate on the ground that denial of her right to confront the probation officer and other alleged procedural errors at the revocation hearing had rendered the government's evidence insufficient to support the district court's order and that, therefore, her probation should be reinstated. The court of appeals vacated and remanded (Pet. App. A).

---

[1]Petitioner was originally arrested and convicted in the Corpus Christi Division of the Southern District of Texas. Because she resided in Fort Worth, Texas, however, she was assigned to a supervising probation officer from the United States Probation Office in Fort Worth.

Petitioner contends that the court of appeals improperly refused to consider the merits of her appeal of the district court's probation revocation order. However, the court of appeals acted well within its discretion in deciding to vacate and remand; it was not necessary under these circumstances to go on to consider the merits of petitioner's appeal, which the court subsequently will have full opportunity to consider should the government prevail on remand.

Contrary to petitioner's further contention, a second probation revocation hearing would not place her twice in jeopardy in violation of the Fifth Amendment. A criminal defendant whose conviction is vacated on appeal is not placed twice in jeopardy if he is tried a second time on remand to the district court. *Forman* v. *United States*, 361 U.S. 416, 425-426; *Sapir* v. *United States*, 348 U.S. 373; *Bryan* v. *United States*, 338 U.S. 552.[2] In any event, jeopardy does not attach at a probation revocation hearing since the hearing does not determine guilt, and is not a stage of a criminal prosecution. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

---

[2]Petitioner cites six cases (Pet. 7) in which the United States Court of Appeals for the Fifth Circuit refused to remand for retrial following reversal of criminal convictions on appeal. In each case, however, the decision not to remand was based on factual circumstances unrelated to the question whether remand would place the defendant twice in jeopardy. These decisions do not, therefore, support petitioner's argument that the Double Jeopardy Clause bars a retrial upon reversal and remand.

DOJ-1975-12